Etonic Garment Manufacturing Sdn Bhd v Kunn-G Freight Systems (M) Sdn Bhd (Malaysian Airline System Bhd, third party)

HIGH COURT (KUALA LUMPUR) — SUIT NO D6–22–967 OF 2001
AMELIA TEE ABDULLAH JC
22 JANUARY 2010

Contract — Breach of contract — Consignments — Cancellation of order due to failure of delivery within time — Liability of defendant — Whether defendant liable for losses incurred by plaintiff — Whether defendant's responsibility to ensure delivery of goods together with proper documentation — Whether defendant complied with contractual obligations — Whether defendant negligent

The plaintiff, a private limited company carrying on business as a manufacturer of garments for the export market, claimed against the defendant for damages and losses arising from the failure to deliver the garments ('the consignments') within a reasonable period of time. In this case, the plaintiff had directed the defendant to arrange for the delivery by air of 461 cartons of garments to Dublin Airport. The consignments were ordered by Primark Stores Limited, a foreign buyer operating from Dublin. The garments were ladies' 100% polyester polar fleece wrap meant for Primark's product launch for their end of season collection. The plaintiff had used the airfreight because of the delay in manufacturing the garments and the urgency of the new product launch for the winter. The buyer only received 184 cartons. However, the buyer had cancelled their order for the remaining 277 cartons that were yet to be delivered. As a result of the cancellation, the plaintiff claimed against the defendant for losses as follows; RM28,766 for unutilised transportation fees, RM66,945.36 for costs of production, general expenditure of RM11,423.79, RM66,809.93 for loss of profits and RM83m for loss of future profits for the next five years. The defendant, a freight forwarder and licensed customs broker who had been the plaintiff's freight forwarder since 1993, disputed the plaintiff's claim. The defendant contended that their responsibility to the plaintiff was only to the extent of booking a place in the plane for the goods and delivering the goods to the cargo area together with proper documentation. The defendant contended that they had complied with its responsibility when the cargo division of Malaysian Airline System acknowledged receipt of the packages in good condition. It denied any negligence in carrying out its duties or that it had caused the cancellation of the plaintiff's order or loss of future contracts. The defendant counterclaimed for the return of RM15,000 on the grounds that the said sum was paid bona fide and without admission of liability in an attempt to resolve the issue between the parties. Since the plaintiff had commenced this

action, the defendant contended that the sum was wrongly paid and counterclaimed for its return. The defendant had also issued a third party notice to the third party, Malaysian Airline System Bhd ('MAS'), for indemnity in the event that this court was to find the defendant liable for the plaintiff's claim. The defendant pleads that the negligence or failure of MAS to comply with the instructions of the plaintiff and defendant in transporting the goods to Dublin had caused or contributed to the defendant's liability. MAS had denied any liability arising from the defendant's possible liability to the plaintiff. In any event, MAS pleads that the Carriage by Air Act 1974 and the Carriage by Air Acts (Application of Provisions) Order 1967 exclusively governs the liability of MAS, which was denied.

Held, dismissing the plaintiff's claim with costs:

(1) The freight forwarder is a broker who arranges consignments between the consignee and the carrier. The freight forwarder assists the consignor to deliver the consignment into the hands of the carrier. In this case, the defendant assisted the plaintiff by arranging for the transport of the plaintiffs goods to Dublin. After ascertaining the transportation needs of the plaintiff, the defendant would determine the carrier and schedule options available. The choice of carrier and schedule has to be approved by the plaintiff before the defendant arranges for the consignment to be delivered to the carrier according to the transportation schedule (see para 74 & 83).

(2) Since the defendant neither undertook to deliver the consignment to Dublin itself nor was it capable of either doing so or else of ensuring that MAS as carrier did so, the court finds that the defendant by delivering the consignment from the plaintiff's factory to MASkargo and arranging for the transport of the plaintiff's consignment through MAS, had complied with its contractual obligations. The obligation to deliver the goods to Dublin rests on MAS and this was in fact admitted by them (see para 84).

(3) The defendant had complied with its contractual obligations by delivering the consignment to MASkargo. It was not responsible for transporting the goods to Dublin and as such cannot be held negligent for not ensuring that the goods were transported in a timely manner. Accordingly, any damage, loss or loss of profit suffered by the plaintiff could not be said to have arisen from the negligence of the defendant. Thus, the plaintiff had not succeeded in proving its case against the defendant on a balance of probabilities. Since the plaintiff's case against the defendant failed, no order can be made against MAS for indemnity (see para 85).

(4) In respect of the defendant's counterclaim against the plaintiff for the return of the RM15,000, there is no evidence that there was an undertaking or agreement by the plaintiff that they would not commence

any legal action against the defendant or that that constituted the basis for the payment of the RM15,000. The payment of the said sum was towards the settlement of the plaintiff's claim against the defendant pending its counterclaim against the carrier, MAS, which was expected to take some time. Notwithstanding the finding against the plaintiff in its claim against the defendant for damages and loss as a result of failure of delivery, the court was unable to find that the payment of the RM15,000 was paid in error and as such the defendant's counterclaim was dismissed (see para 87).

[Bahasa Malaysia summary

Plaintif, syarikat sendirian berhad yang menjalankan perniagaan sebagai pembekal pakaian untuk pasaran eksport, menuntut terhadap defendan untuk ganti rugi dan kerugian yang timbul akibat daripada kegagalan menghantar pakaian ('pengkonsainan') dalam tempoh masa yang munasabah. Dalam kes ini, plaintif telah mengarahkan defendan menguruskan penghantaran 46 karton pakaian melalui kapal terbang ke Lapangan Terbang Dublin. Pengkonsainan itu telah dipesan oleh Primark Stores Limited, pembeli asing yang beroperasi di Dublin. Pakain itu merupakan 100% selendang bulu polar poliester wanita bagi tujuan pelancaran produk Primark untuk koleksi akhir musim mereka. Plaintif telah menggunakan penghantaran udara disebabkan kelewatan membekal pakaian itu dan pentingnya pelancaran produk itu untuk musim sejuk. Pembeli hanya menerima 184 karton. Walau bagaimanapun, pembeli telah membatalkan pesanan mereka untuk baki 277 karton yang masih belum dihantar. Akibat daripada pembatalan itu, plaintif menuntut terhadap defendan untuk kerugian seperti berikut, RM28,766 untuk kos pengangkutan yang tidak digunakan, RM66,945.36 untuk kos pengeluaran, perbelanjaan am sebanyak RM11,423.79, RM66,809.93 untuk kerugian keuntungan dan RM83 juta untuk kehilangan untung masa depan selama lima tahun seterusnya. Defendan, pengurus tranportasi dan broker kastam berlesen yang telah menjadi pengurus tranportasi plaintif sejak tahun 1993, telah mempertikaikan tuntutan plaintif. Defendan menegaskan bahawa tanggungjawab mereka kepada plaintif hanya setakat menempah tempat dalam kepal terbang untuk barangan dan menghantar barangan itu ke dalam kawasan kargo bersama dokumen yang betul. Defendan menegaskan bahawa mereka telah memenuhi tanggungjawab apabila bahagian kargo Sistem Penerbangan Malaysia mengakui penerimaan bungkusan-bungkusan tersebut dalam keadaan baik. Ia menafikan apa-apa kecuaian dalam melaksanakan tugasnya atau telah menyebabkan pembatalan pesanan plaintif atau kehilangan kontrak masa depan. Defendan telah menuntut balas untuk pengembalian RM15,000 atas alasan bahawa jumlah tersebut telah dibayar secara bona fide dan tanpa pengakuan liabiliti dalam percubaan untuk menyelesaikan isu antara pihak-pihak. Oleh kerana plaintif telah memulakan tindakan ini, defendan berhujah bahawa jumlah itu tersalah bayar dan menuntut balas untuk ia dipulangkan. Defendan juga telah mengeluarkan

notis pihak ketiga kepada pihak ketiga, Sistem Penerbangan Malaysia Bhd ('MAS'), untuk indemniti sekiranya mahkamah ini mendapati defendan bertanggungjawab untuk tuntutan plaintif. Defendan memplid bahawa kecuaian atau kegagalan MAS untuk mematuhi arahan plaintif dan defendan dalam menghantar barangan itu ke Dublin telah menyebabkan atau menyumbang kepada liabiliti defendan. MAS menafikan terdapat apa-apa liabiliti yang timbul daripada apa-apa kebarangkalian liabiliti defendan terhadap plaintif. Dalam apa keadaan, MAS memplid bahawa Akta Pengangkutan Melalui Udara 1974 dan Perintah Pengangkutan Melalui Udara (Pemakaian Peruntukan) 1975 secara ekskusif mengawal liabiliti MAS, yang telah dinafikan.

Diputuskan, menolak kes plaintif dengan kos:

(1) Pengurus pengangkutan merupakan broker yang menguruskan pengkonsainan antara penerima barang dan pembawa. Pengurus pengangkutan membantu penghantar barang untuk menghantar pengkonsainan itu kepada pembawa. Dalam kes ini, defendan telah membantu plaintif menguruskan pengangkutan barangan plaintif ke Dublin. Setelah menentukan keperluan pengangkutan plaintif, defendan perlu menentukan pembawa dan pilihan jadual sedia ada. Pilihan pembawa dan jadual perlu diluluskan oleh plaintif sebelum defendan mengatur untuk pengkonsaian itu dihantar ke pembawa itu menurut jadual pengangkutan (lihat perenggan 74 & 83).

(2) Oleh kerana defendan tidak bertanggungjawab menghantar pengkonsainan itu ke Dublin mahupun mampu berbuat demikian atau memastikan bahawa MAS sebagai pembawa berbuat demikian, mahkamah mendapati defendan dengan menghantar pengkonsainan dari kilang plaintif ke MASkargo dan menguruskan pengangkutan pengkonsainan plaintif melalui MAS, telah memenuhi kewajipan kontraktualnya. Kewajian untuk menghantar barangan itu ke Dublin terletak pada MAS dan ini telah diakui oleh mereka (lihat perenggan 84).

(3) Defendan telah memenuhi kewajipan kontraktualnya dengan menghantar pengkonsainan ke MASkargo. Ia tidak bertanggungjawab untuk menghantar barangan itu ke Dublin dan oleh itu tidak boleh dipertanggungjawabkan kerana cuai untuk memastikan bahawa barangan itu dihantar mengikut masa yang sewajarnya. Oleh demikian, apa-apa kerosakan, kerugian atau kehilangan keuntungan yang dialami oleh plaintif tidak boleh dikatakan timbul akibat daripada kecuaian defendan. Oleh itu, plaintif tidak berjaya membuktikan kesnya terhadap defendan atas imbangan kebarangkalian. Oleh kerana kes plaintif terhadap defendan gagal, tiada perintah boleh dibuat terhadap MAS untuk indemniti (lihat perenggan 85).

(4) Berhubung dengan tuntutan balas defendan terhadap plaintif untuk pulangan RM15,000 itu, tiada bukti bahawa terdapat akujanji atau perjanjian oleh plaintif bahawa mereka tidak akan memulakan apa-apa tindakan undang-undang terhadap defendan atau yang membentuk asas untuk bayaran RM15,000 itu. Bayaran untuk jumlah tersebut adalah untuk penyelesaian tuntutan plaintif terhadap defendan sementara menunggu penyelesaian tuntutan balasnya terhadap pembawa MAS yang dijangka akan mengambil masa. Walaupun terdapat penemuan terhadap plaintif dalam tuntutannya terhadap defendan untuk ganti rugi dan kehilangan akibat kegagalan penghantaran, mahkamah tidak dapat memutuskan bahawa bayaran RM15,000 itu telah silap dibayar dan dengan itu tuntutan balas defendan adalah ditolak (lihat perenggan 87).]

Notes

For cases on breach of contract in general, see 3(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2566–2823.

Cases referred to

Fullji Realty Sdn Bhd v Lim Yong Meng [2007] 3 MLJ 39, HC (refd)
Powermatic-Apcom Systems Pte Ltd v Concord Express (S) Pte Ltd [1999] 3 SLR 513, CA (refd)
Seagate Technology International v Changi International Airport Services Pte Ltd [1997] 3 SLR 1, CA (refd)

Legislation referred to

Carriage by Air Act 1974
Carriage by Air Acts (Application of Provisions) Order 1967
Carriage by Air (Ringgit Equivalents) Order 1978

CK Ng (Wong & Associates) for the plaintiff.
KA Gan (PY Ng with him) (Lee Hishamuddin) for the defendant.
WF Lai (Shearn Delamore & Co) for the third party.

Amelia Tee Abdullah JC:

[1] The plaintiff, Etonic Garment Manufacturing Sdn Bhd, is a private limited company carrying on business as a manufacturer of garments for the export market. Its claim against the defendant, Kunn-G Freight Systems (M) Sdn Bhd, is for damages and loss as a result of failure of delivery. The plaintiff's claims include RM28,766 for unutilised transportation fees, RM66,945.36 for costs of production, general expenditure of RM11,423.79, RM 66,809.93 for loss of profits and RM83m for loss of future profits for the next five years.

[2] The plaintiff's claim is disputed by the defendant, Kunn-G Freight Systems (M) Sdn Bhd. The defendant is a freight forwarder and licensed customs broker who had been the plaintiff's freight forwarder since 1993. The defendant contends that its responsibility to the plaintiff was only to the extent of booking a place in the plane for the goods and delivering the goods to the cargo area together with proper documentation. It contends that it had complied with its responsibility when the cargo division of Malaysian Airline System (MAS) acknowledged receipt of the packages in good condition. It denied any negligence in carrying out its duties or that it had caused the cancellation of the plaintiff's order or loss of future contracts.

[3] The defendant counterclaimed for the return of RM15,000 on the grounds that the said sum was paid bona fide and without admission of liability in an attempt to resolve the issue between the parties. Since the plaintiff has now commenced an action, the defendant contends that the sum was wrongly paid and counterclaimed for its return.

[4] The defendant has also issued a third party notice to the third party, Malaysian Airline System Bhd ('MAS'), for indemnity in the event that the court finds the defendant liable for the plaintiff's claim. The defendant pleads that the negligence or failure of the third party to comply with the instructions of the plaintiff and defendant in transporting the goods to Dublin has caused or contributed to the defendant's liability.

[5] The third party, Malaysian Airline System Bhd (MAS), has denied any liability arising from the defendant's possible liability to the plaintiff. It denies that it caused or contributed to the loss allegedly suffered by the plaintiff. In any event, the third party pleads that the Carriage by Air Act 1974 and the Carriage by Air Acts (Application of Provisions) Order 1967 exclusively governs the liability of the third party, which liability was denied.

AGREED FACTS

[6] Certain facts have been agreed between the plaintiff and the defendant and as between the defendant and the third party. These agreed facts have greatly assisted the court in arriving at its decision.

[7] It is an agreed fact that sometime towards the middle/end of November 1999, the plaintiff had directed the defendant to arrange for the delivery by air of 461 cartons of garments ('the consignments') to Dublin Airport. The consignments were ordered by Primark Stores Ltd, a foreign buyer operating from Dublin, Ireland.

[8] The defendant arranged for the carriage of the consignments with the third party, MAS. The consignments were sent by MAS under two air waybills, namely:

(i) 286 cartons on pallets PAG 32304 MH, PMC 60040 MH and PMC 60042 MH vide air waybill No 332–88801101 dated 18 November 1999 scheduled to be sent from Kuala Lumpur to Dublin on 20 November 1999 onboard flight MH6130; and

(ii) 175 cartons on pallets PMC 60096 MH and PAG 32063 MH vide air waybill No 232–8913875 dated 23 November 1999 scheduled to be sent from Kuala Lumpur to Dublin on 25 November 1999 onboard flight MH 6162.

Based on the particulars on these two air waybills, the defendant was the shipper/consignor; Twoway International Ltd was the consignee and MAS was the carrier.

[9] The consignments were sent by the defendant to the cargo area of MAS. The defendant obtained oral confirmation from MAS's cargo care unit and cargo reservation that the consignments had been loaded onto the flights and that the flights had departed for its destination.

[10] On or about 21 December 1999, the plaintiff was informed by the buyer or its agent that there was short delivery of the consignments where only 184 cartons had been received, 80 cartons under air waybill No 232–88801101 and 104 cartons under air waybill No 232–89132875. On 21 December 1999 itself, the plaintiff informed the defendant about the short delivery and that the buyer had cancelled its order for the remaining 277 cartons that were yet to be delivered. The defendant duly informed MAS vide its letter dated 22 December 1999 about the missing consignment.

[11] The plaintiff, vide its letter dated 28 December 1999, informed MAS about the cancellation of the yet undelivered consignments since the buyer had cancelled its order on 22 December 1999. The defendant too informed MAS by both letter and fax dated 29 December 1999 about the cancellation of the delivery of the remaining consignments. Notwithstanding the letters/fax from both the plaintiff and the defendant, the balance of the consignment under air waybill No 232–88801101 amounting to 206 cartons arrived in Dublin on 25 January 2000. According to MAS, they were received by the consignee in Dublin without any complaint as to irregularities.

[12] Although MAS had initially agreed vide its letter dated 29 March 2000 to refund the unutilised airfreight to the defendant, it subsequently changed its mind. Vide another letter dated 24 July 2000, it expressed its intention not to refund the unutilised airfreight in relation to air waybill No 232–88801101

giving the reason that all the cartons under that air waybill had reached Dublin. Vide another letter, also dated 24 July 2000, MAS informed that it would not refunding any airfreight in relation to air waybill No 232–89132875 as part of the consignment had reached its destination and part was still being held by MAS following the cancellation of the delivery instructions.

THE PLAINTIFF'S CASE

[13] Evidence was lead through Loh Kim Wee ('PW1'), an executive director of the plaintiff that the plaintiff manufactures garments for export and that Primark Stores Ltd ('Primark') from Ireland was one of its largest and most important overseas buyers. At the material time, it exported 30–40% of its products to Primark. The defendant was a freight forwarder and customs broker who had been providing services to the plaintiff since 1993.

[14] Under normal circumstances, the plaintiff would get its purchase orders from Primark six or seven months earlier or, in urgent cases, at least 90–120 days before shipment. However, in this particular case, there was some delay on the part of the plaintiff in the manufacture of the garments for Primark. These garments were ladies' 100% polyester polar fleece wrap meant for Primark's product launch for their end of season collection. Because of the time constraint, plaintiff had to use airfreight to ship the consignments to Dublin.

[15] Two invoices P1 and P2 were issued to Primark. In P1, the buyer is described as Primark, the aircraft as MH6130 and the date of departure is 20 November 1999. The consignments are described as 3,342 pieces of ladies 100% polyester polar fleece wrap with a price per unit of US$5.30 per piece, thus arriving at a total price of US$18,189.60. The weight of the consignment was 34.320 M3 which converts to 5720kg. In P2, the aircraft is MH 6162 and the departure date is 25 November 1999. The 175 cartons contained 2,100 pieces of polar fleece wrap with a total price of US$11,130. The weight of the consignment is 21,000 M3 which works out to 3005kg.

[16] In the two air waybills ('P5 and P6') issued by the defendant, the plaintiff was described as the Shipper and Primark as the consignee. PW1 complained that the conditions of contract on the reverse of these air waybills were not brought to his attention. However he confessed that he would not know if they were brought to any other person's attention. Reference was also made to the two air waybills issued by MAS to the defendant. In air waybills No 232–88801101('P7') and No 232–89132875 ('P8'), the shipper/consignor is the defendant, the consignee is Twoway International Ltd and MAS is the carrier. PW1 claims that he was unaware of the conditions of contract on the reverse of P7 and P8 because the documents were given to the defendant and not brought to his attention.

[17] PW1 identified the two invoices that were issued by the defendant in respect of freight charges under P7 and P8. The invoices for air waybill No 232–88801101 (P7) and air waybill No 232–89132875 (P8) shows that the plaintiff paid RM47,072.45 and RM28,741.25 respectively as freight charges. The defendant paid in full for both consignments in early December by way of letters of credit.

[18] The court notes that PW1's evidence in relation to the air waybills appears to be suspect when he admitted during cross-examination that he was *not aware of any air waybills*. Prior to the loss of the goods, he was not involved at all with the defendant. His involvement in this case was only to recover the losses.

[19] PW1 testified that it was the plaintiff's practice to ship goods to Primark by sea under FOB contracts. Cargo would normally take about 21 days to reach its destination. He admitted that he had no proof of this which would be within the purview and knowledge of the shipping department. The plaintiff was using airfreight on this occasion because of the delay in manufacturing the garments and the urgency of the new product launch for the winter. When the plaintiff used airfreight to send goods to other countries on previous occasions, it would take not more than two days to reach its destination. PW1 claimed that the defendant was aware of the urgency in shipping the consignment at the earliest possible date or else the plaintiff would not have sent the goods by airfreight.

[20] Through cross-examination of PW1, the court finds that he was clearly not the most suitable person to testify about the plaintiff's prior transactions with the defendant. He admitted that previous freight was not handled by him and he had no knowledge of the transactions between the plaintiff and Primark. He even admitted that his evidence about the shipment in question was not within his personal knowledge. The quality or lack thereof of PW1's evidence would inevitably affect the plaintiff's case.

[21] In December 1999, Tantex Pte Ltd, Primark's agent in Singapore, sent the plaintiff a fax dated 21 December 1999 to inform that there was short delivery of stock under both air waybills. The plaintiff immediately asked the defendant to check on the missing cargo. On 24 December 1999, the plaintiff sent a memo ('P18') to the defendant to submit claims to MAS in respect of 206 missing cartons under air waybill No 88801101 and 71 missing cartons under air waybill No 232-89132875. The value of the missing goods was US$17,617.20 or RM66,945.36.

[22] The defendant forwarded to MAS the plaintiff's debit note dated 28 December 1999 for RM66,945.36 ('P19') in respect of the missing cargo

A together with a letter ('P20') informing that the buyer had cancelled the short-delivered consignments on 22 December 1999 and that the cargo was no longer required to be shipped. And on 5 January 2000, the plaintiff wrote to Tantex to suggest that the buyer consider the missing cargo as a cancelled order.

B

[23] On 24 January 2000, Primark was informed by its customs broker that the 206 cartons under air waybill No 232–88801101 had arrived in Dublin between 24 January 2000 and 25 January 2000 ('P24'). On 1 February 2000, Tantex informed the plaintiff that 206 of the missing cargo had arrived but that the buyer had not yet decided whether to accept the order at a discount or C whether to return it. The plaintiff responded by informing Tantex that the 206 cartons should be regarded as a cancelled order and that it would not entertain any request for a discount or refund if the goods were accepted ('P26'). Vide a faxed message dated 10 Feberuary 2000, Tantex informed the plaintiff that D Primark had already cancelled the order when the goods did not arrive. The question was posed as to why the airline had still flown in the goods. It was unfortunate that Primark's clearing company had cleared the 206 cartons when the order was already cancelled. They were returning the goods but wanted an official letter from plaintiff that they would pay for all expenses incurred in the E return ('ID27'). The plaintiff's response was that the cartons 'no longer belonged to Etonic Garment but belong to Malaysia Airlines' and as such, they would not bear any expenses.

[24] Vide a letter dated 11 February 2000, the plaintiff wrote to the F defendant to demand for the refund of RM32,548 under air waybill 232–88801101 and RM11,218 under air waybill No 232–88132875, both totaling RM43,766, being the amount of unutilised air freight. Reference was made to a letter from the defendant dated 21 February 2000 ('P33') where the defendant had offered to settle the amount claimed by installments without G any admission of liability. However, payment was stopped on some post-dated cheques after the plaintiff confirmed that it was pursuing the full claim for the unshipped consignments through legal process.

H **[25]** Thereafter more unhappiness and disagreement ensued between the parties. Tantex informed that Primark wanted the plaintiff's forwarder to take back the goods as demurrage charges were increasing. The plaintiff's stand was that the goods no longer belonged to them and therefore they were not liable to pay demurrage charges.

I

[26] On 10 March 2000, Tantex informed the plaintiff that Primark was seeking a refund of US$18,571.20 for the missing cargo that it had already paid for ('P48'). On 20 March 2000, Tantex faxed a letter to inform the plaintiff that Primark was now demanding a sum of US$37,068.59 as settlement for the

missing cargo, loss of profit, airline handling and duty. The plaintiff refused to pay the US$27,068.59 demanded but only agreed to pay US$17,172.

[27] The plaintiff pursued the defendant with a claim of RM109,019.60 for the missing cargo as well as unutilised air freight. In a letter dated 3 April 2000 ('P52'), it also informed the defendant that it was also holding it liable for any future compensation which Primark may claim against it.

[28] Evidence was led that US$17,172 was in fact paid to Primark vide a Hong Leong Bank Bhd bank draft. Primark accepted the sum but nevertheless still demanded for administration, airline handling and duty charges. The plaintiff in turn asked the defendant to pay Primark a sum of US$3,006.24 in respect of the said charges ('P55'). The defendant did not do so and explained the reasons for their decision vide their letter dated 2 April 2000 ('P56') to Primark. Subsequently on 2 May 2000, the plaintiff informed Tantex that Mr Loh Kim Wah was willing to consider paying the USS$3,006.24 from his own pocket to resolve the matter amicably on condition that Primark would keep the goods in its warehouse until further notice from Mr Loh. The goods were not to be released to the defendant or their representatives unless they were prepared to pay the full sum for the duty and administrative charges.

[29] However, the payment of the US$3,006.24 to Primark did not mark the end of the matter. Tantex then informed plaintiff that Primark was still awaiting confirmation as to when the goods could be released. It informed that storages charges were being incurred and would be debited to the plaintiff's account. plaintiff was given until 26 May 2000 to remove the goods. The plaintiff's response was that the goods legally do not belong to them and that it was up to Primark what they wish to do with it. The plaintiff expressed in no uncertain terms that they would not be liable for any further claims for charges as they were no longer the owner of the goods and that they considered the case closed.

[30] PW1 informed the court that following this incident Primark, which had been a customer of the plaintiff since 1998, stopped buying garments from the plaintiff. Orders were made six to seven months before shipment and as such goods supplied between January 2000 and December 2001 were ordered in 1999 up to mid 2000. No new orders were received from Primark after this incident. The plaintiff tried in vain to secure businesses with Primark but in vain. According to PW1, 'they just do not want to do business with us'.

[31] PW1 produced the sales figures for Primark for the period from 1998–2001 ('ID 67'). The figures are RM7,236,861.82 for 1998, RM20,123,995.06 for 1999, RM15,673,510.52 for 2000 and RM1,614,439.23 for 2001.

[32] As regards the issue of whether the plaintiff should have mitigated its losses, PW1's stand was that it was impossible for the plaintiff to do so because the goods were ordered to the specifications of Primark for their new winter product launch. Further the consignment came in different sizes and colours and it would have been impossible for Primark and the plaintiff to sell the garments in just one size or colour because of the missing cartons. Further, the cost of bringing back the returned cargo was too high. In any event, it would also be very difficult to get another buyer as the winter season was coming to an event.

[33] For the same reasons as stated above, the plaintiff decided not to take back the 71 missing cartons under air waybill No 232–89132875 which remained with MAS. It made no sense to take back these 71 cartons as MAS had refused to refund the unutilised airfreight charges and the plaintiff had decided to pursue its claim against the defendant.

[34] PW1 explained the basis for the various amounts claimed by plaintiff as follows:

(i) RM28,766 for unutilised airfreight for the missing cargo. The original figure was RM43,766 from which is deducted the RM15,000 already paid by the defendant;

(ii) RM66,945.36 as cost of production for the missing cargo. A total of 206 + 71 cartons = 277 cartons x 12 pieces per carton x US$5.30 per piece = US$17,617.20;

(iii) RM11,423.70 (US$3,006.24) as general expenses comprising administration charges of RM934.80 and airfreight and duty charges of RM10,488.90;

(iv) RM66,809.93 as loss of profit on the missing 277 cartons; and

(v) Loss of future profits amounting to RM83m for the next five years. However, PW1 confessed that he was not able to explain how this loss was arrived at. According to him, the person who would be able to explain was the accountant, Mr Chang, but he had already resigned from the company.

[35] PW1 testified that the plaintiff blamed the defendant for the incident. The plaintiff's stand was that after the defendant took delivery of the 461 cartons, they were under a duty to ensure that the consignments were shipped to Dublin on time. As regards the defendant's contention that they had never given any assurance that the consignment would be delivered in a few days but that it needs only be delivered within a reasonable time, PW1's response was that such a contention was absurd and would defeat the whole purpose of sending cargo by air. Shipping of goods by air is costly and would only be done

for perishable goods and when there is urgency. Based on past experience, the plaintiff expected the cargo to arrive within a few days. A delay of one to two months was hardly reasonable. PW1 claimed that the defendant was aware of the urgency in delivering the consignments which were meant for the winter season.

[36] The court notes with no small surprise that PW1 agreed with defendant's suggestion the latter's obligation under the contract was only to deliver the goods to the cargo area of MAS and that in this case, that had been done. He agreed that the defendant could not send the goods to Dublin and that the plaintiff was aware that the defendant would have to rely on MAS to deliver the goods to Dublin. He further *agreed that the defendant had no control over MAS in delivering the goods to Dublin* and that as far as the contract between plaintiff and defendant was concerned, once the defendant had delivered the goods to MASkargo, it was beyond its control when MAS will deliver the goods.

[37] As the plaintiff's shipping manager, Chan Ken Leong ('PW2') was in charge of arranging shipping documents, freight and transportation documents and booking space from the forwarder. He had been involved in the export of the plaintiff's products for some 17 years and would thus be familiar with the procedure for exporting goods by sea and air. Prior to the incident, he had dealt with the defendant numerous times for the export of goods. In his experience, the defendant would deliver the cargo from the plaintiff's premises all the way to the destination of the plaintiff's customer.

[38] For the transport of goods by air, there are two stages. One stage is by land from the plaintiff's premises to the airport and the second stage is from the airport to the destination overseas. Only one rate is charged for the services provided.

[39] PW2 testified that he was involved in exporting the consignments to Ireland in this case. Before the goods were sent, there had to be agreed departure and arrival dates. The defendant had an obligation to ensure that the goods are forwarded to MAS and the plaintiff pays the defendant the moment the goods are delivered to MAS. The customer is then informed of the date of delivery. If they do not receive the goods, they will call. Normally, the plaintiff does not check with the customer whether they have received the goods. The defendant is not told about the plaintiff's terms of contract with the customer. PW2 was however unable to produce the relevant documents to prove that the Primark was informed that the goods had been sent despite being given time to locate the said documents.

[40] The goods were sent from Malaysia to Ireland on 20 November 1999 and 25 November 1999. Normally the customer in Dublin will receive the goods three to five days after the departure date. As the plaintiff did not receive any calls from the customer three to five days after the departure dates, they considered that the goods were received. The plaintiff only came to know about the short delivery on or about 21 December 1999. PW2 denied that the plaintiff was at fault when it failed to call or check to see if the customer had received the goods.

[41] PW2 admitted that he had knowledge that the defendant would forward the cargo to MAS. The defendant had also informed him that they used MAS's services to forward the cargo and the plaintiff had agreed to this. However, he disagreed with the suggestion that its obligation was only to forward the plaintiff's cargo from its warehouse to MAS's warehouse. He contends that the plaintiff had consigned the defendant to forward the cargo to Ireland Airport and not to MAS's warehouse only. He disgareed that it was the duty of MAS to forward the cargo from KLIA to Ireland Airport. When it was discovered that part of the cargo had not reached Ireland, the plaintiff contacted the defendant and not MAS. The defendant did not say that it was not their responsibility. Instead, their response was that they would try to locate the missing goods.

THE DEFENDANT'S CASE

[42] The defendant's managing director, Choi Fook Chye ('DW1'), owned 49% of the company's shareholding and had 15 years' experience in the freight forwarding business. He explained that freight forwarders are brokers who arrange the consignment between the consignor and the carrier. They assist the consignor to deliver the consignment up to the hands of the carrier. The carrier would accept the consignment with a receipt of acknowledgement. In engaging the defendant as a freight forwarder, the consignor does not provide the defendant with the terms of the consignment between the consignor and the consignee.

[43] In the usual course of business, the consignor will approach the defendant with details of the consignment eg number of cartons, weight, destination and time of pick up from the consignor's factory. The defendant would then deal with the carrier for the carriage arrangement. The carrier will revert with a schedule which is relayed by the defendant to the consignor. The consignor will then confirm with the defendant their agreement on the carrier and the transportation schedule. Thereafter, the defendant will arrange for the consignment to be picked up on the date given by the consignor and will arrange for the consignment to be delivered to the carrier according to the

transportation schedule. The defendant will contact the carrier to check on the departure status of the consignment and relay the information to the consignor.

[44] DW1 testified that the defendant was in no position to actually verify the departure status of the consignment and this was known by the plaintiff. It was for the consignor and consignee to follow up between them on the actual delivery. The defendant does not need to take any step unless the consignor informs about any discrepancy or delay in delivery 'within the anticipated time of delivery, which is usually two to four days from the departure date'.

[45] The defendant was the plaintiff's broker for its import and export consignments by air and DW1 had been dealing with the plaintiff on consignment deliveries for more than five years. He would usually deal with Chan Kean Leong (PW2) in the plaintiff's shipping department. In the usual course of business between the parties, Chan would call him with details of the consignment. DW1 will provide Chan with options of available carriers suitable for the consignment as well as information on the carrier's transportation schedule. Chan will decide and inform DW1 about its choice of carrier. Once the carrier and the transportation schedule is confirmed, DW1 will then make a booking and pick up the consignment on the date specified. He delivers the consignment to the carrier, checks with the carrier on the departure of the consignment and relays the information back to Chan.

[46] DW1 told the court that the plaintiff was aware that the carrier was MAS and that the defendant had no control over MAS's flight schedule. According to him, the plaintiff knew that the defendant depended on MAS for the delivery of the consignment according to the flight schedule *as confirmed by MAS*. The plaintiff also knew that the defendant's task ended when the consignment was delivered to MASkargo. Although he admitted that he had not informed plaintiff that defendant's responsibility ends upon delivery of the consignment to KLIA, he nevertheless maintained that he had earlier expressed to PW2 that defendant's responsibility ends as soon as the consignment is passed to MASkargo.

[47] The court's attention was drawn to the air waybill which states that carriage of the goods is subject to the conditions of contract on the reverse of the waybill ('D79'). On the reverse is a notice informing about the applicability of the Warsaw Convention to limit the liability of the carrier.

[48] The plaintiff was well aware that the carrier was MAS and had given instructions in respect of the consignment prior to 18 November 1999. The transportation schedule was on 20 November 1999 via MH6130. The defendant picked up the consignment on the evening of 17 November 1999

and delivered it immediately to MASkargo. The acceptance receipt ('D80') shows that the consignment reached MASkargo on 18 November 1999 at 0435 hours. In respect of air waybill 232–89132875 (P6), the plaintiff's instructions were given prior to 23 November 1999. It chose MAS for the consignment and the transportation schedule was on 25 November 1999 via MH 6126. The defendant picked up the consignment from the plaintiff on the evening of 22 November 1999 and delivered it immediately to MASkargo. The acceptance record (D80) shows that the consignment reached MASkargo on 23 November 1999 at 0100 hours.

[49] The defendant knew that the consignee was Primark and that the consignment was garments. However, DW1 claimed that the defendant was unaware of the purpose of the consignment or the terms of contract between Primark and the plaintiff. The plaintiff did not inform the defendant the date the consignment was required to reach Primark.

[50] DW1 confessed that although the information received from MAS was that the consignment had departed from Malaysia to Dublin, however, he was not in a position to verify the actual departure status but would have to take MAS's word for it. The consignment was expected to reach Dublin within two to three days. He admitted telling PW2 that the consignment had departed from Malaysia to Dublin as well as the expected date of arrival at Dublin, which was two to three days after the departure date.

[51] It was only on 21 December 1999 that PW2 informed DW1 that some of the cartons in the consignments were missing. He immediately called MAS to verify the status of the missing cargo and when MAS did not provide any information, he wrote P18 to the plaintiff and P15 to MAS. P18 is a facsimile to the plaintiff for the attention of PW2. The contents of this facsimile are pertinent and the relevant portions are thus reproduced below for ease of reference:

> We receive your message on missing cargo on 21/12/1999 and immediately checked with MAS on the status. However up to yesterday, MAS had no further information (their systems will clear after 15 days) was obtained. In view of the above, *I will be going to Sepang today to seek the status as my responsibility*. Also attached are some correspondences with our agent in Dublin, who has given all documents to your consignee's clearing agent i.e. Central Shipping.
>
> Our agent also do not know of the shortages as Central Shipping had not informed them and they (central) have been contacting the airlines directly themselves. Had they reverted earlier, we would have been adverted the consequences. Apart from the above, I will need to see the MAS Manager today to update you on the missing cargo as the System has nothing to show. (Emphasis added.)

[52] P15 is the defendant's letter to MAS dated 22 December 1999. Apart from bringing the 206 missing cartons on air waybill 232–88801101 and the 71 missing cartons on air waybill 232–89132875 to MAS's attention, the letter contains the following paragraph:

> *THESE CONSIGNMENTS ARE MEANT FOR THE CHRISTMAS SEASON IN DUBLIN*. AT DESTINATION, THE PARTIES HAD CONFIRM THAT THERE IS A TOTAL OF 206 CTNS MISSING FOR AWAB 1101 AND 71 CTNS MISSING FOR AWAB 2875.
>
> THERE IS AN URGENT NEED TO CLARIFY THE MISSING ITEMS *AS SHIPPER WILL BE SLAP WITH COMPENSATION SUMMONS BY THEIR BUYER*. WE HAVE CHECKED WITH THE AIRPORT ON STATUS OF OUR SHIPMENT AND HAD BEEN INFORM THAT ALL CONSIGNHMENTS HAD DEPARTED FROM KUL. THERE IS NO FURTHER DETAILS FROM YOUR SIDE AND WEN HOPE THAT YOUR GOOD OFFICE CAN SHED SOME LIGHT ON THE ABOVE. (Emphasis added.)

[53] Subsequently, the defendant received the plaintiff's letter dated 24 December 1999 to submit claims to the carrier MAS together with the debit note (P19) as well as a letter to MAS informing that the buyer had cancelled the short-shipped consignment on 22 December 1999 and confirming that the missing consignment, if found, was no longer required to be shipped. The defendant duly made a claim on behalf of the plaintiff.

[54] The defendant received a demand dated 11 February 2000 from the plaintiff for the refund of unutilised cargo space which had been paid to the defendant. The total amount of refund sought was RM43,756. The defendant denied any negligence. It took the stand that it was merely assisting the plaintiff in forwarding its claim to MAS. Further, in order that the plaintiff would continue to pay outstanding amounts owed, the defendant agreed to settle the refund by monthly installments of RM3,000. The outstanding amount would be settled after the defendant had obtained judgment in an action commenced against MAS. Cheques were forwarded on a without admission of liability basis and on the understanding that plaintiff would not make any claims against it arising from the non-delivery of the cartons.

[55] The defendant paid up to RM15,000 but stopped the rest of the payments after it was served with the writ of summons. It took the stand that since the plaintiff had commenced this action, it should now refund the RM15,000 paid due to a failure of consideration.

[56] In cross-examination, DW1 testified that when the plaintiff chose MAS as the carrier, the defendant used the services of forward freight who were the air waybill holders of MAS. They could not deal directly with MAS. MAS, as a carrier, appoint numerous agents to sell on their behalf and forward freight

A was one of them. The plaintiff could not deal directly with forward freight or with MAS. The defendant makes payment to MAS through forward freight and MAS issues receipts to forward freight. Although the defendant makes the booking, it uses Forward Freight's Master Air Waybill for submission.

B **[57]** DW1 confirmed that the fee collected from the plaintiff did not only cover the transportation of the consignment from the plaintiff's factory to MASkargo but all the way to Dublin Airport. He admitted that at the time of collecting the fee in respect of this particular shipment, they did not inform the plaintiff that they were in no position to control or monitor the transportation C schedule and the actual delivery by MAS. However, for earlier consignments, he claimed to have informed PW2 that they were in no position to control transportation by third parties.

D **[58]** During cross-examination by MAS, DW1 agreed that Primark is not stated anywhere on the air waybills. The details of the shipper and consignee were provided by the defendant to MAS and the flight details were provided by MAS.

E THE THIRD PARTY'S CASE

[59] Anthony Clement ('DW2') was the senior manager operations commercial of MAS since 1 October 2007. In such position he was responsible for overseeing the cargo operations of MAS which includes the arrival and F departure of all cargo aboard MAS flights. He was also responsible for overseeing the handling of claims relating to delayed and lost cargo.

[60] According to DW2, MAS requires claims for delay or loss of cargo to be made within the time period as stipulated under the Warsaw Convention. G Article 26 states that complaints of delay must be made at the latest within twenty-one days from the date on which the baggage or cargo had been placed at the disposal of the person entitled to delivery. MAS will investigate the complaint and, if satisfied, will pay compensation. The limit of liability under article 22 is two hundred and fifty francs per kilogram unless the consignor has H made a special declaration of interest and paid a supplementary sum. And under the Schedule to the Carriage by Air (Ringgit Equivalents) Order 1978, two hundred and fifty francs is equivalent to RM48.

[61] As senior manager operations commercial of MAS, DW2 had access to I all documents and records of MAS pertaining to this case. He testified that in the two air waybills issued by MAS, the defendant was named as the shipper or consignor and a company called Twoway International Ltd was named as the consignee. The plaintiff was not named in the air waybills at all and there was no record that MAS was aware of the involvement of the plaintiff. He admitted

that he was not sure if MAS investigated the present claim as he was not the person in charge at the time. He conducted investigations when the matter was brought to his attention in 2009.

[62] DW2 admitted that in respect of air waybill 232–88801101 dated 18 November 1999, the cargo was delivered by the defendant and received by MAS on 18 November 1999. In respect of air waybill 232–89132875, the cargo was received on 23 November 1999. He identified the official weight slips that were extended to the defendant at the point in time when the cargo was submitted to MASkargo.

[63] Only part of the 286 cartons in respect of air waybill 232–88801101 were delivered — 80 boxes were delivered on 30 November 1999, 10 days after the cargo was loaded onto a MAS flight and the balance reached Dublin in January 2000. In respect of air waybill 232–89132875, 104 boxes were delivered to Dublin on 4 December 1999, 10 days after they were loaded onboard a MAS flight on 25 November 1999. The balance of 71 boxes were not delivered as by then the plaintiff had notified MAS that the buyer had cancelled delivery and the missing consignment was not required to be delivered, if found.

[64] DW2 was asked how MAS would confirm whether the amount of goods loaded onto a plane conforms to the air waybill. The court recorded the following response from him:

> MAS will use the cargo manifest to check against the number of pieces loaded in the flight. Physical checking of goods is done in the warehouse as against the manifest. No one will physically check to ensure that all 286 pieces are on board.

[65] DW2 admitted that defendant had informed MAS on 22 December 1999 about the short delivery and sought clarification about the missing consignment. MAS did not respond. He claimed that there was no need to do so as their priority was to locate the missing consignment and to arrange for delivery. Vide a letter dated 28 December 1999, the plaintiff informed MAS that the buyer had cancelled the consignment as a result of the short delivery and that the balance of the cargo which did not arrive in December 1999 was no longer required to be shipped. The plaintiff also placed on record that they would be submitting their claim through their freight forwarder. On the same date, MAS received a debit note from the plaintiff for the sum of RM66,945.36. MAS did not respond. DW2 offered the explanation that they usually respond only to parties named in the air waybill.

[66] In due course, MAS received an undated notice ('P21') from the defendant forwarding the plaintiff's claim. However, this notice was received

only after the expiry of the 21 days notice period. Further, Twoway International Ltd, the consignee named in the two air waybills, did not lodge any complaint. MAS did not pay any compensation.

[67] DW2 disputed that the defendant had obtained verbal confirmation from MAS that the cargo had been loaded onto the MAS flights. He claimed that it was not MAS's procedure to provide verbal confirmation of the loading of cargo and that in any event there was no record of such verbal confirmation.

[68] It is noteworthy that DW2 agreed with the defendant that after the defendant had delivered the goods to MASkargo, *those goods were no longer its responsibility but became the responsibility of MAS*. He agreed that the defendant would no longer be in a position to control or monitor the transportation schedule of the cargo. He agreed that it was the responsibility of MAS to ensure that the cargo took off on the flight and date scheduled and that the cargo reached its destination. However, he disagreed that if there was any delay or failure of delivery in full or in part of the goods to its ultimate destination, it would be the responsibility of MAS.

[69] During cross-examination by the plaintiff, DW2 testified that there was no direct MAS flight to Dublin and that MAS had informed the defendant about this through the air waybill. However, during cross- examination by the defendant, he testified that he did not know if there were any direct flights from KLIA to Dublin at the material time. 'First Trucking' means that whenever there is a first truck available from the transit point to Dublin, they would put the cargo on board. He was unfortunately unable to answer how long it would take for the cargo to reach Dublin from KLIA.

[70] MAS disagreed with the suggestion that it had failed to deliver the two consignments in full because the full shipment in respect of air waybill 232–88801101 had reached Dublin by January 2000. As for air waybill 232–89132875, 104 cartons were delivered on 4 December 1999. The balance of the 71 cartons was not delivered as the plaintiff had cancelled delivery.

EVALUATION AND FINDINGS

[71] In coming to a decision in this case, I have carefully considered the evidence adduced by the plaintiff and the defendant as well as the third party, MAS, including the many volumes of documents relied on by the parties. I have also had the advantage of reading the submissions and authorities submitted to court.

[72] Based on the pleadings and evidence adduced, it is clear that the plaintiff is bringing this action against the defendant for damages arising from

both breach of contract as well as negligence in transporting the goods to Dublin. As such, the preliminary issues to be resolved are as follows:

(i) What is the relationship between the plaintiff and the defendant?

(ii) What are the contractual obligations between the plaintiff and the defendant?

(iii) Was the defendant guilty of negligence in transporting the goods which resulted in loss of goods or delay in the goods reaching its destination?

(iv) Did the damage, loss or loss of profit arise from the negligence of the defendant?

[73] It is not in dispute as between the plaintiff and the defendant that the latter is a freight forwarder and licensed customs broker or that it had been the forwarding agent of the plaintiff since 25 November 1993. What then is a freight forwarder and what are the duties and the obligations of the defendant as freight forwarder?

[74] The freight forwarder is a broker who arranges consignments between the consignee and the carrier. The freight forwarder assists the consignor to deliver the consignment into the hands of the carrier. Reference is made to the Wikipedia which defines a freight forwarder as follows:

> A freight forwarder … is a third parry logistics provider. As a third party (or non asset based) provider a forwarder dispatches shipments via asset based carriers and books or otherwise arranges space for those shipments. Carrier types include waterborne vessels, airplanes, trucks or railroads.

[75] Reference was also made to an article *The Pandora's Box of Unimodal Regimes in a Multimodal World: Reasons Why Malaysia Needs a Multimodal Framework* by Dr Irwin UJ Ooi [2007] 1 MLJ cxlviii which states as follows:

> A freight forwarder would arrange for the goods to be collected from the doorstep of the consignor and ensure that it is delivered to the doorstep of the consignee. The task of obtaining the right carrier for each mode of transport would be left to the freight forwarder. From the point of view of the consignor, a daunting practical challenge is simplified as dealings are now confined to the freight forwarder. Documentation is also simplified as the freight forwarder would usually issue a house bill of lading. The consignor need not worry about obtaining a rail consignment note from the rail carrier, shipped bill of lading from the sea carrier, or a road consignment note from the road hauler. The freight forwarder would contract with each of those unimodal carriers and obtain the relevant documents to facilitate the transport of the goods. The only cargo document that would be in the possession of the consignor would be the house bill. *The freight forwarder is therefore not a carrier*, but merely an auxiliary person, a professional intermediary between cargo interests and the carrier, who arranges and organizes the carriage of goods from

A departure to destination and who *neither undertakes to carry the goods himself nor accepts liability as a carrier*. (Emphasis added.)

B **[76]** In the case of *Powermatic-Apcom Systems Pte Ltd v Concord Express (S) Pte Ltd* [1999] 3 SLR 513, the Court of Appeal in Singapore had occasion to deal with the position of a freight forwarder. The appellants had brought an action against the respondents who were freight forwarders for negligence, breach of contract, conversion and bailment, claiming damages for lost goods. The respondents applied to strike out the statement of claim on the basis that it disclosed no reasonable cause of action and/or was an abuse of process. The C respondents relied on the judgment of the Court of Appeal in *Seagate Technology International v Changi International Airport Services Pte Ltd* [1997] 3 SLR 1 in pleading that the appellants were not entitled to bring any action at common law but only under the Warsaw Convention of 1929 as amended by the Hague Protocol of 1955 which had force of law in Singapore by virtue of D the Carriage of Air Act (Cap 32A). The judge at first instance agreed that appellant's claim fell within article 18 of the amended Convention which governed the liability of a carrier for loss or damage to registered baggage and cargo in the course of a carriage by air. The judge found that since article 18 formed the sole and exclusive cause of action for the appellant's claim and this E article was not pleaded, the statement of claim was defective.

[77] On appeal, His Lordship Karthigesu JA held that *as freight forwarders, the respondents were not a carrier for the purposes of the amended Convention* and F were therefore not subject to the regime imposed by article 18. The respondents did not undertake to perform any part of the carriage by air, but merely undertook the ancillary land transportation to and from the respective airports and arranged for the shipment of the goods from Singapore to Mumbai.

G

[78] In our instant case, the plaintiff's claim is against the defendant as freight forwarder. The court notes that the plaintiff has not filed any action against the carrier, MAS, and that the latter is only before the court as a result of the issuance of a third party notice against them by the defendant. What H then is the effect and significance of a third party notice?

[79] In the case of *Fullji Realty Sdn Bhd v Lim Yong Meng* [2007] 3 MLJ 39, the defendant took out a third party claim for indemnity and contribution against the solicitor acting for the purchaser. The question arose as to whether I the court was competent to determine whether the third party was independently liable to the plaintiff without having to restrict itself to the question of whether the third party was liable to indemnify or make contributions to the defendant in the event the court found the defendant liable. In that case, Kang Hwee Gee J held as follows:

A third party proceedings is essentially an independent proceedings between the defendant and the third party. If the plaintiff intends to obtain judgment against the third party, it would have to apply to add the third party as a defendant under O 15 r 6 of the Rules of the High Court 1980. It follows in this instance that the third party is absolved from liability by reason that the plaintiff has failed against the defendant.

[80] Applying the decision of *Fullji Realty Sdn Bhd*, it is clear that the third party notice does not act to include MAS directly as a defendant to answer the plaintiff's claim. The court will only have to consider the issue of its liability to indemnify the defendant or otherwise *in the event* the court finds the defendant liable for the plaintiff's claim. If the court were to find the defendant not liable, it follows there from that the issue of liability to indemnify the plaintiff would not arise.

[81] In this case the plaintiff is not proceeding against MAS as carrier. It is therefore not bound by the provisions of the Carriage by Air Act 1974 wherein articles of the Warsaw Convention have been incorporated into the first schedule. The court thus finds that the plaintiff is entitled to proceed against the defendant freight forwarder for breaches of contract as well as negligence without the need to plead article 18.

[82] What then are the obligations of the defendant as a freight forwarder? Has the defendant carried out what it had contracted with the plaintiff to do? The court has carefully perused the two air waybills P5 and P6 issued by the defendant. In the absence of any better and more illuminating document, the air waybills would be the best evidence of what the defendant as freight forwarder had contracted to do. In P5, the defendant is described as 'Issuing Carrier's Agent'. P5 also contains the legend that the consignment was scheduled to depart via MH6130 on 30 November and this flight was described as the 'First Carrier'. As for P6, the consignment was scheduled to depart on board MH 6126 on 25 November.

[83] The court views P5 and P6 collectively together with the two air waybills issued by MAS. On the face of the documents itself, the plaintiff would have known that the defendant was *not* going to carry consignment to Dublin. P5 and P6 would reinforce the defendants assertion that is not a carrier, that it is only a freight forwarder whose responsibility is to arrange consignments between the consignee and the carrier. Based on the evidence adduced, the court accepts that in this case, the defendant assists the plaintiff by arranging for the transport of the plaintiff's good to Dublin. The court recall the evidence adduced that after ascertaining the transportation needs of the plaintiff, the defendant would determine the carrier and schedule options available.The choice of carrierand shedule has to be approved by the plaintiff

before the defendant arranges for the consignment to be delivered to the carrier according to the transportation schedule.

[84] Although PW1 initially blamed the defendant for the delay in delivering the consignment claiming that they were under a duty to ensure that the consignment were shipped to Dublin on the time, the court notes that during cross-examination, he agree that:

(i) The defendant's obligation was only to deliver the goods to the cargo area of MAS;

(ii) The defendant cannot send the goods to Dublin by itself;

(iii) The defendant would have to rely on MAS to deliver the goods to Dublin; and

(iv) Once the defendant had delivered the goods to MASkargo, it was beyond its control when MAS will deliver its cargo.

In such circumtances, since the defendant neither undertook to deliver the consignment to Dublin itself nor was it capable of either doing so or else of ensuring that MAS as carrier did so, the court finds that the defendant by delivering the consignment from the plaintiff's consignment through MAS, had complied with its contractual obligations. The obligation to deliver the goods to Dublin rests on MAS and this was in fact admitted by them.

[85] It is inevitable that where a party has suffered loss, as the plaintiff has in this case, that one is tempted to search for some place on which to place the liability. However, the fact that the plaintiff has suffered loss does not, ipso facto, mean that the defendantor some other must be held liable to compensate the plaintiff. In this case, the defendant had complied with its contractual obligations by delivering the consignment to MASkargo. It was not responsible for transporting the goods to Dublin and as such cannot be heldnegligent for not ensuring that the goods were transportated in a timely manner. Accordingly, the court finds that any damage, loss or loss of profit suffered by the plaintiff could not be said to have arisen from the negligence of the defendant. The court finds that the plaintif has not succeeded in proving its case against the defendant on a balance of probabilities.

[86] As pointed out earlier, MAS was brought in as a third party by the defendant to indemnify the defendant against any damages, compesation or costs which it (the defendant) may be held liable to pay to the plaintiff arising from this action. Since the plaintiff's case against the defendant fails, no order can be made against MAS for indemnity.

[87] In respect of the defendant's counterclaim against the plaintiff for the return of the RM15,000, the court finds that the evidence adduced does not

support the defendant's contention that the said sum was paid erroneously ('secara silap'). There is no avidence that there was an undertaking or agreement by the plaintiff that they would not commence any legal action against the defendant or that that constitued the basis for the payment of the RM15,000. The court finds that the payment of the said sum was towards the settlement of the plaintiff's claim against the defendant pending its counterclaim against the carrier, MAS, which expected to take some time. Notwithstanding that the court has found against the plaintiff in its claim against the defendant for damages and loss as a result of failure of delivery, the court is unable to find that the payment of the RM15,000 was paid in error and as such the defendant's counterclaim is hereby dismissed.

[88] Accordingly, the plaintiff's case against the defendant is dismissed with costs. There is no order for indemnity against the third party. As between the defendant and the third party, each party is to bear its own costs.

Plaintiff's claim dismissed with costs.

Reported by Ashgar Ali Ali Mohamed